EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

BRIAN V. HUNTER AND JEFFERY JORDAN
v. JAMES V. BRYANT, JR.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90-1440. Decided December 16, 1991

JUSTICE STEVENS, dissenting.

The question in this case is *not* whether a reasonable officer could have believed that respondent posed a threat to the life of the President. Those "who guard the life of the President," *ante*, at 1 (SCALIA, J., concurring in judgment), properly rely on the slightest bits of evidence—nothing more than hunches or suspicion—in taking precautions to avoid the ever-present danger of assassination. Mere suspicion is obviously a sufficient justification for a host of protective measures such as, for example, careful surveillance of a person like respondent. The question that is presented, however, is whether a reasonable trained law enforcement officer could have concluded that the evidence available to petitioners at the time they arrested respondent constituted probable cause to believe that he had committed the crime of threatening the life of President Reagan.

The evidence on which the officers relied to support their conclusion that probable cause existed is summarized in two affidavits which they filed in support of their motion for summary judgment. That evidence includes three relevant components: (1) a rambling, confusing letter written by respondent contained statements indicating that a "Mr Image" intended to assassinate the President while he was in Germany; (2) the officers "believed that the use of the term Mr. Image may have been a pseudonym for [respondent] Bryant and that Bryant was writing in the third person," App. to Pet. for Cert. 48a, 54a.; and (3) when

respondent delivered a copy of the letter to Veronica Tincher in the budget office of the University of Southern California, he "said something about 'across the throat', while simultaneously moving his hand horizontally across his throat to simulate a cutting action," *id.*, at 43a.

The affidavits explained that in addition to the above facts, the affiants were "concerned that Bryant might pose a threat to the President's well-being." *Id.*, at 48a, 54a. It is also noteworthy that when the officers visited Bryant in his apartment, he allowed them to enter and voluntarily consented to a search for weapons in plain view, and then to a second search of the entire residence. That search resulted in nothing more than the discovery of the original of the letter.

The letter is the key piece of evidence supposedly justifying a finding that the officers reasonably believed that Bryant had threatened the life of the President. Bryant freely admitted to writing the letter, and the letter does refer to, among other things, a scheme to assassinate President Reagan. The letter does not, however, state that it is Bryant who intends to assassinate the President. Rather, the letter warns that "Mr Image" intends to harm the President. Nor does the letter leave the identity of "Mr Image" in doubt. In its first sentence, the letter identifies the term parenthetically: "Mr 'Image' (Communist white men within the 'National Council of Churchs)." *Bryant* v. *United States Treasury Department, Secret Service*, 903 F. 2d 717, 724 (CA9 1990) (reprinting Bryant's letter). The letter then proceeds to explain the derivation of the term: "The name 'Image to the Beast' is a biblical name given to and identifys the National Council of Churches as a body . . . though the NCC is composed largely of women, it is men who really control it. So it is appropriate to respectfully address the NCC as Mr IMAGE!" *Ibid.* A postscript to the letter further specifies the Biblical origin of the term and its identification with the National Council of Churches: "Mr Image—(NCC) is scard to death over the posiability of being exposed by the prophecy of Rev. 13:11-17 & Rev. 14:9–11."[1] *Id.*, at 727. At other places in the letter, as well, "Mr Image" is identified with the National Council of Churches through parenthetical references.

Bryant's letter advances a conspiracy theory accusing the National Council of Churches of spreading communism and scheming to assassinate the President.[2] Such a theory is of course absurd, but this absurdity does not mean that Bryant was threatening to harm the President. A vast gap separates the conclusion that a letter warning of an assassination threat is preposterous or delusional and the conclusion that the letter, itself, constitutes a threat by the author. Even if a delusional warning may serve to identify the author as mentally unstable and justify appropriate

---

[1] In the original, "(NCC)" is written above the word "Image," and the connecting arrow runs downward. Defendants' Memorandum of Points and Authorities in Support of Motion for Summary Judgment in No. CV 86–3134 (CD Cal.), p. 61. The arrow is omitted in the copy of the letter reprinted in the Court of Appeals' opinion.

[2] The National Council of Churches has at times come under attack for allegedly supporting subversive activity. In 1983, for example, such charges were leveled against the National Council of Churches in a segment of the television program "60 Minutes" and in an article appearing in the Reader's Digest, Isaac, Do You Know Where Your Church Offerings Go?, Reader's Digest, January 1983, pp. 120–125. The president of the National Council of Churches responded to media reports by stating "'[T]he National Council of Churches is not a worldwide socialist conspiracy . . . [It] does not supply arms to communists, revolutionaries, or anyone else. The National Council of Churches does not believe in the violent overthrow of any government.'" Christian Science Monitor, May 5, 1983, p. 3 (reporting speech of Bishop James Armstrong, president of the National Council of Churches). For reports of criticism of the National Council of Churches closer in time to the incident at issue here, see, e. g., Los Angeles Times, April 27, 1985, part 2, p. 5, col. 1 (reporting statement by Peter Reddaway of London School of Economics that "'[w]ittingly or unwittingly, the NCC is deeply involved in concealing and distorting the truth about the Soviet Union . . .'"); *id.*, April 25, 1985, part 5, p. 1, col. 2 (reporting statement by associate professor of history at Seattle Pacific University that the National Council of Churches "has done a disservice to Christians in the Soviet Union by 'buying the Soviet line' as handed to them by official Soviet church leaders . . .").

surveillance of his activities, such legitimate concern does not transform a delusional warning into a threat. As I suggested at the outset, the confusing set of facts may well have justified a trained officer in coming to the conclusion that a mentally unstable person might pose a threat to the President's well-being. No matter how reasonable such an officer's belief may have been, that kind of suspicion is not a substitute for a reasonable determination that the *evidence* established probable cause to arrest.

The District Court denied the petitioners' motion for summary judgment seeking dismissal on the ground of qualified immunity because it decided that further fact-finding was necessary. On such a motion, the court was of course required to resolve any disputed question of fact against the moving parties. In my opinion the Court of Appeals correctly stated the governing standards when it wrote:

"Qualified immunity is an affirmative defense for which the government official bears the burden of proof. *Harlow* v. *Fitzgerald*, [457 U. S. 800, 815 (1982)], *Benigni* v. *City of Hemet*, 853 F. 2d 1519 (9th Cir. 1988). As with all summary judgment motions, the evidence should be viewed in the light most favorable to Bryant as the nonmoving party; to prevail on their motion for summary judgment, the defendants must show that they were reasonable in their belief that they had probable cause. Bryant, however, bears the burden of proving that the right which the defendants allegedly violated was clearly established at the time of their conduct. . . .

". . . In order for a secret service agent reasonably to have believed he had cause to arrest Bryant, the agent must have been reasonable in his belief that Bryant's words and the context in which he delivered them were a serious threat against the president. *Watts* v. *United States*, [394 U. S. 705 (1969) *(per curiam)*].

"Whether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment or a directed verdict in a §1983 action based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach. *Kennedy* v. *L. A. Police Department*, 887 F. 2d 920, 924 (9th Cir.1989), *McKenzie* v. *Lamb*, 738 F. 2d 1005, 1008 (9th Cir.1984). Because qualified immunity protects government officials from suit as well as from liability, it is essential that qualified immunity claims be resolved at the earliest possible stage of litigation. *Mitchell* [v. *Forsyth*, 472 U. S. 511, 526 (1985)]. This necessarily expands the factfinding role that must be played by the district court judge. In some cases, district courts will be able to establish entitlement to qualified immunity before trial and, sometimes, even before discovery. . . . In some cases, however, further development of the record will be necessary. In this case it was proper for the court to require further development of the facts to determine whether the secret service reasonably could have interpreted the letter as violating §871." 903 F. 2d, at 720–721.

Like JUSTICE SCALIA, I am satisfied that the Court of Appeals applied the correct legal standard when it affirmed the District Court's refusal to grant summary judgment in favor of petitioners. When the Court of Appeals opinion is read in its entirety, that conclusion is inescapable. Unlike JUSTICE SCALIA, however, I am also satisfied that when the proper legal standards are applied to this record, with the evidence examined in the light most favorable to the nonmoving party, petitioners have not yet established that a reasonable officer could have concluded that he had sufficient *evidence* to support a finding of probable cause at the time of respondent's arrest. I also think it unwise for this Court, on the basis of its *de novo* review of a question of fact, to reject a determination on which both the District Court and the Court of Appeals agreed.

Accordingly, I respectfully dissent.